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SUPREME COURT, U.S.

Supreme Court of the United States

OCTOBER 1955 TERM

No. 72

FRANK COSTELLO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE

The petitioner and the Government have consented to the filing of this brief in support of the petition for rehearing. The American Civil Liberties Union is a national organization devoted to the protection of the rights guaranteed in the Constitution of the United States and particularly in the Bill of Rights.

At the time certiorari was granted in this case the Union considered asking for consent or leave to file a brief amicus but did not do so because it did not appear clearly from the decision of the court below (221 F. 2d 668, 677) that the issue involved the fundamental concept of the power of a grand jury to return an indictment "where as here all the evidence before the grand jury was in the nature of 'hearsay'." Opinion of this Court, 76 S. Ct. 406, at p. 408. This Court's opinion explicitly rules out (at the same page) any challenge to an indictment "on the ground that there was inadequate or incompetent evidence before the grand jury." In so doing this Court appears to go so far beyond the opinion of the court below, and beyond the concurring

opinion of Mr. Justice Burton, as to place this case in a different posture.

It now appears to the Union that an important constitutional right—not to be tried for a federal felony unless on presentment or indictment of a grand jury—is about to be substantially denied and apparently only because of the Court's concern with possible delay in federal criminal cases.

It is not denied that judicial concern about delay in the administration of federal criminal justice is an appropriate consideration, even in determining the novel constitutional question whether the Fifth Amendment protects a person from an indictment not based on any competent evidence. But the opinion of the Court appears to suggest that this policy consideration of possible delay is the principal—if not the sole—basis of the decision that, provided it is "legally constituted and unbiased," the grand jury may constitutionally return an indictment which is based exclusively on the request of the prosecutor, and on no evidence at all. It is submitted that there are other policy considerations which should be weighed carefully before such a construction of the Fifth Amendment is finally made by this Court.

One relevant policy consideration would be an analysis, which cannot be presented here, of the number of federal indictments which are dismissed or nolle prossed or in which acquittals are obtained for lack of sufficient evidence. A not insubstantial number of federal indictments is disposed of from time to time by the filing of nolles based on lack of available evidence to seek a conviction. The defendants, however, sometimes for a period of years, have been subjected to all the consequences of the social condemnation which follows an indictment. The Court's opinion would probably encourage rather than discourage this practice.

Another relevant consideration is that traditionally in our American system federal prosecutors are appointed from among attorneys politically active in the currently dominant political party and are not wholly free from possible political influence. It is not seriously denied that grand juries are very greatly influenced by, if not wholly subservient to, the wishes of the prosecutor in respect of returning indictments. Wayne Morse, *A Survey of the Grand Jury System*, 10 Ore. L. Rev. 101.

Another relevant policy consideration is the danger that the Court's opinion will also influence State prosecutors and procedures, because of a tendency not to accord to individuals in State criminal cases any greater protection than this Court determines in federal criminal cases.

II

There would not be as much concern if the Court's opinion accepted the rule set forth in the concurring opinion of Mr. Justice Burton which would authorize the quashal of an indictment if it were shown that the grand jury had before it "no substantial or rationally persuasive evidence" (76 S. Ct. 406, at p. 409). But the Court's opinion does appear to be susceptible to the interpretation that an indictment based on nothing more than a prosecutor's request, or a Government agent's wholly unsubstantiated charge, is constitutionally sufficient. It is difficult to conceive that the constitutional right not to be tried for a felony except upon a grand jury indictment is fully satisfied by a paper called an indictment but not based on any evidence. Yet is that not the effect of the Court's opinion here?

Respectfully submitted,

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